Filed 3/29/19 P. v. Calderon CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JUAN JOSE CALDERON, Defendant and Appellant.	A153038 (San Francisco County Super. Ct. No. SCN 222433) ORDER MODIFYING OPINION AND DENYING REHEARING

BY THE COURT:

It is ordered that the opinion filed herein on March 4, 2019, be modified as follows:

In the last paragraph on page 10, preceding the disposition, the fourth and fifth sentences which begin "If, say, Calderon . . ." and "In that hypothetical situation . . ." respectively, are deleted. The next sentence that begins "But nothing about the facts . . ." is modified to read "Nothing about the facts . . ."

The following sentence is added at the end of the paragraph: "Because no instructional error appears, we also reject Calderon's related constitutional claims. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135 [where conspiracy instructions were not given in error, claim of violation of constitutional rights to due process and to a fair trial based on those instructions fails]; *People v. Mills* (2010) 48 Cal.4th 158, 199 [where there was no prosecutorial misconduct, 'a fortiori' there was no federal constitutional error].)"

The petition for rehearing is denied. This modification does not change the judgment.

Dated: _____ _____ P.J.

A153038, *People v. Calderon*

Filed 3/4/19 P. v. Calderon CA1/2 (unmodified opinion)

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THE PEOPLE, Plaintiff and Respondent, v. JUAN JOSE CALDERON, Defendant and Appellant.	A153038 (San Francisco County Super. Ct. No. SCN 222433)

A jury found defendant Juan Jose Calderon guilty of assault with a deadly weapon and found true the allegation that he personally inflicted great bodily injury. It found him not guilty of mayhem, battery, and criminal threats.

According to Calderon, the victim punched him first, and fearing for his life, he pushed the victim to the ground, held him down, pulled out his knife, and placed it within inches of the victim's face. Calderon testified he did not intend to stab the victim but has never disputed that his knife did cut the victim's face, causing an injury that required stitches.

The jury was instructed on self-defense as a defense to the charged offense mayhem, the lesser included offense of battery, the charged offense assault with a deadly weapon, and the lesser included offense of simple assault. The jury was also instructed on accident as it related to the mental state required for mayhem and battery.

Calderon's sole claim on appeal is that the trial court erred in refusing to instruct the jury on accident for the charge of assault with a deadly weapon. We find no error. Although there was evidence that the victim was cut by accident (so that Calderon lacked

the mental state necessary to establish mayhem or battery), there was no substantial evidence that Calderon committed the act constituting assault with a deadly weapon by accident. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Prosecution's Case

The victim, Carlos Danz, testified that on March 31, 2013, he spent the afternoon and evening eating and drinking with relatives in San Mateo. He estimated he drank six or seven beers starting around 8:00 p.m. Around 10:30 or 11:00 p.m., Danz headed home to San Francisco, taking public transportation. Around midnight, he got off the bus before he reached home to get cigarettes. He bought a pack of cigarettes at a store on Mission Street between 21st and 22nd.

While Danz was walking toward a bus stop and smoking, Calderon approached him and asked him for a cigarette. Danz gave him a cigarette, and a couple of minutes later, Calderon asked for another. Danz did not give Calderon another cigarette and Calderon's demeanor quickly changed. According to Danz, Calderon punched him several times with closed fists and kicked him, causing him to fall to the ground. He put his knee on Danz's chest and got on top of him. Danz never tried to fight back and was afraid. He denied ever hitting Calderon.

Calderon yelled, "I'm going to kill you," and Danz became more scared. After he said he was going to kill Danz, Calderon pulled a knife from his waist and put it in front of Danz's face. Danz testified, "When I saw the knife . . . coming close to my neck, I turned my face and the knife hit my face." Danz touched his face and saw blood. He was taken to the hospital and received stitches on his face. He wore a bandage for a month and a half, and at trial four years after the incident, he could still see the scar on his face.

Wilber Guivo was working security at the door of Blue Macaw, a club on Mission Street, on the night of the incident. He observed Danz on the street smoking a cigarette and saw Calderon approach him and ask for a cigarette. Danz and Calderon argued, then they calmed down, and a few minutes later, Calderon "launched himself against [Danz]

and he had something, he pulled out something," which Guivo thought was a weapon although he did not see it. Guivo and another person grabbed Calderon and tried to get the weapon away from him. After the altercation, Danz was bleeding and rubbing his face.

Calderon's knife was recovered from the scene, and an officer testified it was over nine inches long.

Defense

Calderon testified in his own defense, and his version of the events of that night varied from Danz's. Calderon is from Los Angeles. Before the incident on Mission Street, he had been staying in San Francisco for about two weeks for an electrical construction job with a contractor for PG&E.

On March 31, 2013, Calderon went to mass and then spent the afternoon and evening with his coworker and roommate in San Francisco, Walter Gutierrez. They met at a restaurant, went to another restaurant and ate, walked around and window shopped, and ended up at a bar on Mission Street called Dr. Teeth around 8:30 p.m. Calderon drank four or five beers at the bar, and three beers earlier in the afternoon. Around 11:45 p.m., Calderon told Gutierrez he was going to step outside and buy a cigar. He went by himself to a smoke shop a few doors south of the bar and bought a cigar, but he did not smoke it immediately. He continued walking south on Mission Street. He entered a club called the Blue Macaw to use the restroom. Calderon was told he would have to pay a cover charge if he wanted to stay, and he left the Blue Macaw within a couple of minutes.

As he walked back to Dr. Teeth, Calderon started asking people for a light. He testified a beautiful woman walked by and, as he turned to look at her, someone "socked" him on the side of his head. He was struck once, it was a "solid hit," and he took two or three steps back. He turned around and saw Danz. He grabbed Danz by the front of his shirt and "took him down." Calderon testified he was scared and "in fear of my life." He

had attended a safety program with his employer and was told to stay away from Mission Street and 24th Street because it was "pretty rough at night."[1]

According to Calderon, Danz "kept swinging with his arms, coming at [him]," and Calderon dodged the blows with his left hand as he held Danz on the ground with his right knee. Calderon cussed at Danz, saying things like, "What the fuck, motherfucker. Who the fuck are you, what the fuck you want from me." Calderon did not know if Danz was alone. He kept turning back to see if someone else was going to hit him. Danz kept swinging, so Calderon got out his work knife from his right front pocket. He used the knife to splice cable and cut conduit and it was very sharp.

Calderon testified, "I brought [the knife] out. I don't know if he was going to reach for it or what. I grabbed it, put it out and I took the blade out. I put it in front of his face. Don't fucking move." He put the knife "pretty close about [a] couple inches away" from Danz's face. Calderon maintained that he did not intend the knife to make contact with Danz, and he did not stab or try to slash at his face. His intent was to scare Danz and for Danz to stop swinging at him. At some point, Calderon saw blood on Danz's face and he became even more scared. He did not remember cutting Danz. Calderon recalled that someone grabbed his hand and told him to let go of the knife. Everything happened quickly. Calderon estimated that no more than seven or eight seconds passed from the time he was struck on the side of the face to when he pulled out his knife.

Jury Instructions

Before trial, defense counsel submitted a list of proposed jury instructions that included CALCRIM No. 3404 on accident. The trial court's initial proposed jury instructions included CALCRIM No. 3404 and applied it to count 1 and its lesser offense (mayhem and battery) and count 2 and its lesser offense (assault with a deadly weapon

[1] Calderon had never been to San Francisco before he got the electrical construction job, and before April 1, 2013, he had never been in the Mission District at midnight.

and simple assault).[2] The prosecutor, however, objected to count 2 being included in the accident instruction, arguing that while there was evidence from which it could be inferred that Calderon used the knife in self-defense, there was no evidence he pulled the knife by accident. The trial court agreed stating, "[T]he assault with deadly weapon doesn't require striking of the victim, right? And . . . there's no evidence that Mr. Calderon accident[al]ly took out the knife and accident[al]ly put it at the victim's face . . . ." The trial court also noted that assault with deadly weapon does not require proof the defendant either touched the victim or intended to use force against the victim, and ruled that count 2 and the lesser included offense of assault would not be included in the accident instruction.

Verdict and Sentence

The jury found Calderon not guilty of mayhem (count 1), battery (lesser included offense to count 1), and criminal threats (count 3). It found Calderon guilty of assault with a deadly weapon (count 2) and found he personally inflicted great bodily injury. Calderon was sentenced to four years in prison.

DISCUSSION

Calderon contends the trial court erred in denying his request for an accident instruction on assault with a deadly weapon on the ground there was substantial evidence he lacked the requisite intent for the offense and, therefore, an accident instruction was appropriate. Specifically, he asserts there was substantial evidence that he did not have actual knowledge or awareness that his holding the knife would probably and directly

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[2] For general or specific intent crimes, CALCRIM No 3404 provides, "The defendant is not guilty of <insert crime[s]> if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of <insert crime[s]> unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent."

Defense counsel's list of proposed instructions did not indicate which charges he wanted the accident instruction to apply to. The trial court's initial proposed jury instructions replaced "<insert crime[s]>" with count 1 (mayhem), count 2 (assault with a deadly weapon), and their lesser included offenses, but did not include count 3 (criminal threats).

result in force, which, he argues, would show he lacked the intent or mental state required to establish he committed assault with a deadly weapon. His contention lacks merit.

Assault with a deadly weapon does not require a showing that the defendant was *subjectively* aware of the risk that an injury might occur. (*People v. Williams* (2001) 26 Cal.4th 779, 790 (*Williams*). Rather, the mental state required for the offense is satisfied so long as the defendant intentionally commits an act while aware of facts that would lead a *reasonable person* to realize the act by its nature would probably and directly result in a battery. (*Ibid*.) The requisite mental state was established in this case by the undisputed evidence that Calderon intentionally pulled out his knife and put it in front of the victim, aware of the facts that the knife was very sharp and that he was placing the blade a couple inches from the victim's face. There was no substantial evidence that Calderon lacked the requisite mental state due to accident. Therefore, the trial court properly denied Calderon's request for an accident instruction on assault with a deadly weapon.

A. *Accident and the Duty to Instruct*

The source of the accident "defense" is Penal Code section 26, paragraph five, which provides "All persons are capable of committing crimes except," among others, "[p]ersons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." (See *People v. Anderson* (2011) 51 Cal.4th 989, 997 (*Anderson*) [discussing "the 'defense' of accident" with "defense" in quotation marks; "We thus recognized the 'defense' would rebut the prosecution's proof of a mental element of the crime"].)

"The defense appears in CALCRIM No. 3404, which explains a defendant is not guilty of a charged crime if he or she acted 'without the intent required for that crime, but acted instead accidentally.' " (*Anderson*, *supra*, 51 Cal.4th at p. 996.) A trial court has no duty to instruct on accident sua sponte; its obligation "to instruct on accident extend[s]

no further than to provide an appropriate pinpoint instruction upon request by the defense." (*Id*. at p. 998.)[3]

Even upon request by the defense, however, a trial court is only required to give a pinpoint instruction "if it is supported by substantial evidence." (*People v. Ward* (2005) 36 Cal.4th 186, 214.)

B. *Assault with a Deadly Weapon*

"Except for strict liability offenses, every crime has two components: (1) an act or omission, sometimes called the actus reus; and (2) a necessary mental state, sometimes called the mens rea." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

Under Penal Code section 245, subdivision (a)(1), it is a crime to "commit[] an assault upon the person of another with a deadly weapon or instrument other than a firearm." An "assault," in turn, is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.)

1. Act Required for Assault

In *People v. Chance* (2008) 44 Cal.4th 1164, 1167, our Supreme Court considered the act required for assault and the meaning of "present ability" to commit a violent injury (Pen. Code, § 240). The court explained "present ability" "is satisfied when 'a defendant has attained the means and location to strike immediately.' " (*Chance*, at p. 1168.) But " 'immediately' does not mean 'instantaneously.' It simply means that the defendant must have the ability to inflict injury on the present occasion." (*Id.* at p. 1168.) "[I]t is the ability to inflict injury on the present occasion that is determinative, not whether injury will necessarily be the instantaneous result of the defendant's conduct." (*Id*. at p. 1171.) The court elaborated, "[W]hen a defendant *equips and positions himself to carry out a battery*, he has the 'present ability' required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken . . . ." (*Id*. at p. 1172, italics added.)

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[3] A pinpoint instruction "relate[s] particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi." (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

In *People v. Nguyen* (2017) 12 Cal.App.5th 44, 46, 48–49, cited by the Attorney General, the court found sufficient evidence of present ability to commit a violent injury where the defendant wielded a large knife and took a step forward at police officers who were 10 to 15 feet away from him. In another case cited by the Attorney General, *People v. Penunuri* (2018) 5 Cal.5th 126, 147, the court upheld an assault conviction where the defendant pointed a gun at the victim and it could be inferred from the defendant's later conduct that the gun had been loaded at the time. In each of these cases, the defendant committed assault by equipping himself with a deadly weapon and positioning himself to carry out a battery, even though the defendant in *Nguyen* did not touch the officers with his knife and the defendant in *Penunuri* did not fire the gun. (*Nguyen*, at pp. 46–47; *Penunuri*, at p. 147.)

2. Mental State Required for Assault

Our high court examined the mental state required for assault in *Williams, supra*, 26 Cal.4th 779. There, the court held, "[A]ssault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Id*. at p. 790.) The defendant must have actual knowledge of such facts "because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know." (*Id*. at p. 788.)

The question whether an act by its nature will probably and directly result in the application of physical force is an objective one. The defendant "need not be subjectively aware of the risk that a battery might occur." (*Williams, supra*, 26 Cal.4th at p. 788.) The "actual knowledge" requirement is satisfied if the defendant is "aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*Ibid*.) Thus, the court explained, "a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*Ibid*., fn. 3.)

C. *Analysis*

On appeal, Calderon does not dispute that his conduct meets the act requirement of assault with a deadly weapon.[4] His claim relates only to the mental state required for the offense and, in particular, the "actual knowledge" requirement. Yet, by his own testimony, Calderon knew the blade of his knife was "very sharp," and he knew that he was placing his knife "pretty close about a couple inches away" from Danz's face in volatile circumstances. He knew that, while he had Danz pinned to the ground with his knee, Danz was moving around and "trying to get up." Calderon even knew that his actions were likely to be perceived as threatening since he testified his intention in placing the knife so close to Danz's face was "to scare him" and get him "to stop swinging at me."

The mental state required for assault with a deadly weapon is satisfied by Calderon's actual knowledge of these facts together with his intentional actions. A reasonable person viewing the facts known to Calderon would find that his actions would probably and directly result in the application of physical force against Danz, even if Calderon himself did not realize the risk of harm. (See *Williams*, *supra*, 26 Cal.4th at p. 790.)

Calderon argues there was substantial evidence that he was unaware that his act by its nature would probably and directly result in the application of physical force against another, i.e., a battery. This is beside the point. The issue is not whether *he* was aware of

[4] According to his own testimony, Calderon "took [Danz] down," held him to the ground with his knee, got out his knife, opened it, and "put it in front of [Danz's] face," while cursing and saying things like "Don't fucking move." These actions satisfy the actus reus of assault with a deadly weapon. By holding Danz down with his knee and placing his knife close to Danz's face, Calderon "equip[ped] and position[ed] himself to carry out a battery." (*Chance*, *supra*, 44 Cal.4th at p. 1172.) (Indeed, Calderon was so well equipped to carry out a battery that immediately after taking these actions, the actus reus of battery occurred, that is, his knife made contact with Danz's face. Calderon was not convicted of battery, presumably because the jury determined the prosecution failed to prove he touched Danz with his knife intentionally.)

the degree of risk of harm involved in his act, the issue is whether a *reasonable person* would be aware of the risk based on the facts known to Calderon.

Calderon next asserts, "there is at least a question of fact as to whether injury was a natural and probable consequence of the willful act of placing the knife in front of Danz's face." But, again, Calderon's subjective beliefs are irrelevant to this question, which is decided objectively based on the facts known to Calderon. He claims there is evidence "that he was not aware of facts indicating injury would necessarily occur," but he does not identify any relevant fact that he was supposedly unaware of. If, say, Calderon had a joke rubber knife in one pocket and his work knife in the other and he testified that he intended to pull out the joke knife but mistakenly and unknowingly pulled out his work knife instead, then an accident instruction would be appropriate. In that hypothetical situation, the question for the jury would be whether a reasonable person would find that his actions would probably and directly result in a battery based on the facts as they were known to Calderon. But nothing about the facts actually known to Calderon suggests he committed the actus reus of assault with a deadly weapon by accident. Simply put, there was no substantial evidence justifying an accident instruction on the evidence presented in this case.[5]

DISPOSITION

The judgment is affirmed.

[5] In his reply, Calderon discusses *United States v. Vasquez-Gonzalez* (9th Cir. 2018) 901 F.3d 1060 at some length, arguing the case demonstrates that an accidental or unintentional act would not qualify as an assault under California law. We do not hold otherwise. A trial court must give a requested accident instruction if substantial evidence supports it, such as in our hypothetical example with a rubber knife.

_____
Miller, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.

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